Filed 4/14/03 P. v. Richardson CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARQUISE RICHARDSON, Defendant and Appellant.	E031429 (Super.Ct.No. RIF 092771) O P I N I O N

APPEAL from the Superior Court of Riverside County. Curtis R. Hinman, Judge. Affirmed.

Kimberly J. Grove, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Bradley A. Weinreb and Douglas C. S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, Marquise Richardson (defendant), was convicted of one count of first degree murder (Pen. Code, § 187) as a result of the August 1, 2000, death of Kyung Noe. Defendant was sentenced to state prison for an indeterminate term of 25 years to life.

He appeals and contends that the sentence is disproportionate to his culpability and unconstitutional under the Eighth Amendment of the United States Constitution and article I, section 17 of the California Constitution. He also contends the case should be remanded for the trial court to determine whether the sentence should be reduced under *Dillon*.

FACTS

On August 1, 2000, defendant entered Jay's market in Corona to cash a check that did not belong to him. Kyung Noe was working behind the counter. Although the record does not reveal Ms. Noe's age, she is described as elderly in testimony and had been married for 32 years. Ms. Noe refused to cash defendant's check, telling him that she had called the bank and the check had no funds. Defendant gestured with his hands, said "Oh, fuck man," and asked to see the check. When Ms. Noe refused to show it to him, he leaned over the counter, grabbed the check out of her hand, and ran from the store. Ms. Noe followed defendant outside the store to his car. She approached defendant, attempting to retrieve the check, but did not touch him. Defendant then hit Ms. Noe in the face with his fist and she fell to the ground. Without looking at Ms. Noe or kneeling to see how she was, defendant got in his car and sped away.

Police arrived within 10 minutes and found Ms. Noe lying in the parking lot, face up. She was unresponsive, breathing, and had a weak pulse. There was blood on her face and mouth, her cheek was swollen, and she appeared to have a broken nose. An ambulance arrived and Ms. Noe was taken to Moreno Valley Regional Hospital where she later died. On autopsy she was found to have a black eye, broken cheekbone, lacerations to the lips, an extensive skull fracture, and bruising to the brain. The autopsy also revealed that Ms. Noe had a thinner than average skull, making her more susceptible to injury; however, a person with a skull of normal thickness could also have died from the same type of blow.

The night of the incident, defendant told his fiancée, Alisha Francis, that he had tried to cash a check at a store, the clerk refused, he ran from the store, the clerk followed, and he pushed her. The next day, after learning of Ms. Noe's death, Alisha told defendant he would have to turn himself in. On August 3, 2002, defendant spoke with his parents about the incident and discussed turning himself in to the police. After an anonymous call to the police department, an officer went to defendant's parents' house on the morning of August 4, 2002. Defendant's father then brought defendant to the house where he was placed under arrest.

WAIVER

Defendant asserts that his sentence of 25 years to life is disproportionate to his culpability, thereby constituting cruel and unusual punishment prohibited by both the United States and California Constitutions. The People contend that because the issue of

cruel and unusual punishment was not raised at sentencing, defendant waived the right to raise the issue on appeal.

"[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) If not raised at trial the claim of a sentencing error is considered waived. Even "'constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal.' [Citation.]" (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060, quoting *People v. Rudd* (1998) 63 Cal.App.4th 620, 628.)

Specifically, the issue of whether a particular sentence results in cruel and unusual punishment should be addressed at the time of sentencing. This is because the analysis to determine whether a statutory punishment is grossly disproportionate to the offense for which it is imposed is based upon the unique facts of each case. (*People v. Dillon* (1983) 34 Cal.3d 441, 482-484.) Therefore, "[s]ince the determination of the applicability of *Dillon* in a particular case is fact specific, the issue must be raised in the trial court." (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27; see also *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) If not raised at that level, the issue is considered waived because the trial court is in the best position to evaluate all of the facts in relation to the proportionality of the sentence. "[F]act-specific errors . . . are not readily susceptible of correction on appeal. . . . [¶] [A]pplication of the waiver rule helps avoid error and the

need for appellate intervention in the first place." (*People v. Scott, supra,* 9 Cal.4th at p. 355.)

There is, however, an exception to the waiver rule. "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott, supra,* 9 Cal.4th at p. 354.) If an error fits within the category of an unlawful sentence, then the error can be raised at any time. (*Ibid*.) Such cases involve "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." (*People v. Welch* (1993) 5 Cal.4th 228, 235.) In other words, an appellate court will "intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing." (*People v. Scott, supra*, 9 Cal.4th at p. 354.)

Here, defendant did not raise the issue of cruel and unusual punishment at sentencing. Because the general rule is that the issue must be preserved at trial, defendant must now show that an exception to the general rule applies. Defendant contends that this case fits within the unauthorized sentence exception to the waiver rule. Although determining whether a punishment is cruel and unusual is a question of law (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358), such determination requires a careful consideration of the facts. Therefore, this is not a case in which an error is clear and correctable independent of factual issues. Furthermore, "legal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions

governing the length of confinement." (*People v. Scott, supra*, 9 Cal.4th at p. 354, fn. omitted.) Here, the court expressly followed the mandatory sentencing provisions.

Based upon the above, we find that defendant has waived the issue of disproportionate sentencing as a violation of the United States and California Constitutions. Nonetheless, in order to foreclose further proceedings on the ground of ineffective assistance of counsel, we will address the merits of defendant's contention.

CALIFORNIA CONSTITUTION

Article I, section 17 of the California Constitution prohibits cruel or unusual punishment. "A punishment is cruel or unusual within the meaning of the California Constitution if 'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Estrada* (1997) 57 Cal.App.4th 1270, 1278.)

"The power to define crimes and prescribe punishment is a legislative function. The judiciary may not interfere in this process unless the statute prescribes a penalty so severe in relation to the crime as to violate the constitutional prohibition against cruel or unusual punishment. [Citations.] . . . Successful challenges to proportionality are an 'exquisite rarity.' [Citation.]" (*People v. Ayon* (1996) 46 Cal.App.4th 385, 398, fn. omitted, disapproved on another ground in *People v. Deloza* (1998) 18 Cal.4th 585, 593, 600, fn. 10.)

In re Lynch (1972) 8 Cal.3d 410, 425-429 applied a three-pronged analysis to determine whether a sentence is so disproportionate to the crime for which it is imposed,

as to constitute cruel or unusual punishment. First, the court examines "the nature of the offense and/ or the offender, with particular regard to the degree of danger both present to society." (*Id.* at p. 425.) The second prong compares "the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses* which, by the same test, must be deemed more serious," (*id.* at p. 426) and the third prong compares "the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions* having an identical or similar constitutional provision." (*Id.* at p. 427.)

"Determinations whether a punishment is cruel or unusual may be based on the first prong alone. [Citations.]" (*People v. Ayon, supra,* 46 Cal.App.4th at p. 399, disapproved on another ground in *People v. Deloza, supra,* 18 Cal.4th 585, 593, 600, fn. 10.) In analyzing this first prong, it is necessary to consider the facts of the crime, in addition to the nature of the crime in the abstract. (*People v. Dillon, supra,* 34 Cal.3d 441, 479.) Such an analysis encompasses "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Ibid*.) Also, the nature of the offender must be examined "in the concrete rather than the abstract . . . ." (*Ibid*.) In other words, the court focuses on the particular person to determine "whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid*.)

Here, defendant relies on the first prong of the *In re Lynch* approach, as enhanced by *Dillon*, to argue that the sentence of 25 years to life is disproportionate to his culpability. He does not discuss the other two prongs of the approach. The first prong requires a consideration of both "'the facts of the crime . . .'" and "'the nature of the offender' in the concrete rather than the abstract . . . ." (*People v. Dillon, supra*, 34 Cal.3d at p. 479.)

Factors to consider in relation to the facts of the crime include motive, how the crime was committed, the extent of the defendant's involvement, and the consequences of the act. (*People v. Dillon, supra,* 34 Cal.3d at p. 479.) In this case, defendant was convicted of first degree murder for fatally striking an unarmed, elderly woman who was trying to retrieve items defendant had taken out of her hand. She did not touch the defendant, but stood within two feet of him. At the time, he was at his car and could have left, but instead, he chose to stop and punch her in the face with his fist.

Only defendant and the victim were involved. Defendant was operating alone; he was solely responsible for each aspect of the offense from entering the store to trying to pass a bad check, grabbing it from Ms. Noe's hand, and punching her in the face. The consequences of his act could not have been more severe, as Ms. Noe died as a result of defendant's attack.

The facts of this crime are very different from those of *Dillon* in which the defendant was confronted by a man with a shotgun. (*People v. Dillon, supra,* 34 Cal.3d at pp. 482-483.) Dillon had heard shots, thought his friends had been shot, and was

afraid of being shot himself. (*Ibid*.) Here, there was no actual or perceived threat to defendant. He simply chose to stop his flight to strike the elderly, unarmed woman behind him.

In considering the "nature of the offender," factors such as age, prior criminality, personal characteristics, and state of mind are considered. At the time of the offense, defendant was 22 years old and had no prior convictions. He argues that he demonstrated remorse by vomiting and crying when he heard of Ms. Noe's death. Also, he mentions that he had expressed a willingness to turn himself in to the police.

Defendant's remorse, however, came after news of Ms. Noe's death was broadcast on television, along with a description of defendant and his girlfriend's vehicle. It is questionable whether he was remorseful about the deed he had done or worried about the trouble he was about to face. It is noteworthy that after knocking Ms. Noe to the ground, he failed to kneel down or look back at her. Furthermore, although he may have talked to his family about turning himself in, he did not make any effort to contact the police. On the third day after the incident, the police arrested him after receiving an anonymous tip.

Defendant's age and lack of prior criminal history are also insignificant. In *Dillon,* the defendant was only 17. (*People v. Dillon, supra*, 34 Cal.3d at pp. 482, 451.) He was described as an immature 17, "intellectually, he showed poor judgment and planning; socially, he functioned 'like a much younger child'; emotionally, he reacted 'again, much like a younger child'. . . ." (*Id.* at p. 483.) Here, there is no evidence that defendant was unusually immature, socially, emotionally, or intellectually. On the

contrary, several letters in support of his motion for bail reduction describe him as "intelligent," "ambitious," and "well mannered." Furthermore, the fact that he has no prior criminal record is not determinative. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 497.)

Nothing in the facts of this case or the nature of this defendant indicates that a life sentence is so disproportionate to his culpability as to constitute cruel or unusual punishment under the California Constitution.

FEDERAL CONSTITUTION

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment. This prohibition is applicable to the states. (*In re Anderson* (1968) 69 Cal.2d 613, 629, fn. 6.) The United States Supreme Court, however, has not consistently applied a proportionality factor to the determination of cruel and unusual punishment. In *Harmelin v. Michigan* (1991) 501 U.S. 957, Justice Kennedy wrote, "Though our decisions recognize a proportionality principle, its precise contours are unclear. This is so in part because we have applied the rule in few cases and even then to sentences of different types." (*Id.* at p. 998, (conc. & dis. opn. of Kennedy, J.).) In the lead opinion of *Harmelin*, Justice Scalia suggested that proportionality may only apply to capital sentences: "Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides. [Citations.]" (*Id*. at p. 994.) Three concurring justices concluded that "[t]he Eighth Amendment does not require strict proportionality between crime and

sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." (*Id.* at p. 1001.) More recently, however, the Court has reiterated the principle "'that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense.' [Citation.]" (*Atkins v. Virginia* (2002) 536 U.S. 304, 344, quoting *Weems v. United States* (1910) 217 U.S. 349.) *Atkins*, however, was reviewing a death penalty imposed upon a mentally retarded defendant.[1]

For the reasons described above, the facts of this case fail to support a contention that the sentence imposed is cruel and unusual as to violate the Eighth Amendment of the United States Constitution.

TRIAL COURT DISCRETION

Defendant also contends that the case should be remanded for sentencing reconsideration. He asserts that the trial court incorrectly concluded that it did not have the discretion to consider the *Dillon* factors; therefore the trial court was unaware of its

---

[1] We note that the United States Supreme Court recently held that the Eighth Amendment did not prohibit a "Three Strikes" law sentence of 25 years to life for a defendant who shoplifted golf clubs worth about $1,200 and had committed three residential burglaries and one first-degree robbery seven years previously. (*Ewing v. California* (Mar. 5, 2003, No. 01-6978) ___ U. S. ___ [2003 D.A.R. 2490].) A majority of the court concluded either that the Eighth Amendment contains only a "narrow" proportionality principle in noncapital cases (Chief Justice Rehnquist and Justices O'Connor and Kennedy) or that it contains no proportionality principle at all (Justices Scalia and Thomas).

We also note that *Andrade v. Attorney General of the State of California* (9th Cir. 2001) 270 F.3d 743, was reversed in *Lockyer v. Andrade* (Mar. 5, 2003, No. 01-1127) ___ U. S. ___ [2003 D.A.R. 2484], a companion case to *Ewing.*

authority to reduce the first degree murder conviction and impose a lesser sentence based upon the constitutional prohibition against cruel and unusual punishment.

The court in *People v. Leigh* (1985) 168 Cal.App.3d 217, 224 held that "while it is true that appellate courts have applied *Dillon* in adjudging the proportionality of sentences in a number of felony-murder cases without any discussions of the authority of trial courts to engage in a similar process, there is no reason in logic or law to deny the trial courts the discretion to determine proportionality under *Dillon* in *appropriate* felony-murder cases." In *Leigh*, the trial court believed that it did not have the authority to reduce the offense under *Dillon*. The trial judge said that the facts of *Leigh* fit those described in *Dillon*, but that he did not have the discretion to reduce the crime charged. (*Leigh,* at p. 223.) "The trial judge stated that absent direction from *Dillon* or subsequent appellate decisions that the trial court could not act on its own to implement the procedures detailed in *Dillon*, that any such balancing test must be carried out by the appellate courts . . . ." (*Leigh,* at p. 223.) The appellate court disagreed and remanded the case for sentencing reconsideration. (*Id.* at p. 224.) Therefore, "a trial court has authority in the first instance to rule on a motion for sentence reduction under *Dillon* . . . ." (*People v. Mora* (1995) 39 Cal.App.4th 607, 616.)

Some appellate courts have indicated that reversal is required if a trial court fails to exercise discretion in sentencing, if such discretion has been conferred upon it by law. (*People v. Penoli* (1996) 46 Cal.App.4th 298, 306; *People v. Downey* (2000) 82 Cal.App.4th 899, 912; *People v. Sherrick* (1993) 19 Cal.App.4th 657, 661*; People v.*

Manners (1986) 180 Cal.App.3d 826, 834-835.) In *Penoli*, the court had refused "to apply the relevant statute out of a categorical preference for its own policy analysis." (*People v. Penoli, supra*, 46 Cal.App.4th at p. 306.) *Sherrick*, *Downey*, and *Manners* all involved misunderstanding or misapplication of sentencing law. None of these cases addressed the constitutionality of a statutorily required sentence or the felony-murder rule.

In this case, the trial court recognized that it had two sentencing alternatives, stating: "Neither of the two alternatives, either probation or 25 to life, to me is fair in this case. . . . It is not a probation case, it is not a 25-to-life case, but unfortunately those are the only two options that we have." The court recognized that it had discretion to order probation or prison and exercised its discretion in choosing prison. The trial judge stated, "So although the family wants the maximum, I wouldn't have ordered it had I had another option, but I don't have another option. The only option I have in a prison commitment is 25 to life, and that's what I intend to do." Although the court had difficulty with the fairness of the sentence, there was no mention of the sentence being grossly disproportionate or cruel or unusual. There is no clear indication that the court did not know or understand that it had the authority to consider the *Dillon* factors had it believed that the sentence was disproportionate. Furthermore, no such objection was raised by the People.

This is not a case of the trial court misapplying or misunderstanding statutory sentencing requirements such as in *Penoli*, *Sherrick*, *Downey* or *Manners*. This is not

even a case such as *Leigh*, in which the court considered the *Dillon* factors but did not believe it had the power to apply them. Here, the court indicated that the sentence may not be a perfect fit, but did not suggest that the imposed sentence rose to the level of cruel or unusual.

Even if the trial court was clearly unaware that it had the authority to consider proportionality, there is no requirement for the case to be remanded. Although *Leigh* stands for the proposition that trial courts may consider the *Dillon* factors, it does not require that only trial courts consider them; appellate courts have, and may continue to review proportionality of sentences in felony-murder cases. (*People v. Leigh, supra*, 168 Cal.App.3d at pp. 223-224.) We have done this, and have determined that under the *Dillon* analysis, the sentence was not disproportionate to defendant's culpability. Therefore, it is not necessary to remand for reconsideration.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

WARD
J.

KING
J.